*
THOMAS P. BEKO, ESQ. (#002653)
BRENT L. RYMAN, ESQ. (#008648)
ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street
P.O. Box 3559
Reno, Nevada 89505
Telephone: (775) 786-3930
Attorneys for Defendants Mulkey, Goins, Curley, and Melendez

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONOVAN PADDY,

Plaintiff,

vs.

DAVID MULKEY, an individual, PEGGY GOINS, an individual, LARRY CURLEY, an individual, and ARLAN D. MELENDEZ, an individual,

Defendants.
_____/

Case No. 3:08-cv-00236-LRH (RAM)

DEFENDANTS' RESPONSE TO PLAINTIFF'S COURT-ORDERED OPENING BRIEF (#41)

COME NOW, pursuant to this Court's Order (#35) of April 15, 2009, Defendants, DAVID MULKEY, PEGGY GOINS, LARRY CURLEY, and ARLAN D. MELENDEZ, by and through their counsel of record, ERICKSON, THORPE & SWAINSTON, LTD., and THOMAS P. BEKO, ESQ. and BRENT L. RYMAN, ESQ., and hereby present their Response to Plaintiff's Opening Brief (#41) addressing the Court's inquiry into whether this case should be stayed while Plaintiff exhausts his tribal remedies.

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As set forth with more particularity in the following Memorandum of Points & Authorities, Defendants respectfully submit that tribal court jurisdiction is clearly colorable for all of Plaintiff's claims and, therefore, this case should indeed be stayed while Plaintiff exhausts his tribal remedies.[1]

MEMORANDUM OF POINTS & AUTHORITIES

I. BRIEF SUMMARY OF FACTS AND POSTURE OF ACTION

As the Court is aware from the parties' briefing of Defendants' pending Motion to Dismiss (#14), this case involves allegations that Defendants, as current and former officials and employees of the Reno-Sparks Indian Colony, terminated his employment in violation of the Family Medical Leave Act ("FMLA"). Plaintiff's Complaint (#1) also asserts common law causes of action for "Intentional Interference with Contractual Relations or Prospective Economic Advantage" and "Conspiracy" against these Defendants. *See* Pl's Compl., ¶¶ 32-43. Defendants generally deny Plaintiff's allegations of illegal or wrongful activity.

In lieu of Answering Plaintiff's Complaint, Defendants first appeared via Motion to Dismiss (#14) pursuant to FRCP 12(b)(1), which now stands fully briefed and ripe for decision. As outlined in that briefing, Plaintiff's claims are subject to dismissal on the basis of sovereign immunity, which protects these Defendants from Plaintiff's FMLA and common-law claims. *See, Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (affirming dismissal of FMLA claims against Tribe and Tribal officials on basis of sovereign immunity); *see also, Myers v. Seneca Niagra Casino*, 488 F.Supp.2d 166, 169-70 (N.D.N.Y. 2006) (same).

Following entrance of the undersigned firm as counsel for Defendants, this Court granted Defendants' Motion for a Stay of Discovery (#34), and discovery is stayed at this time. In the interim, the Court has requested briefing on why the case should not be stayed while Plaintiff exhausts his tribal remedies and the parties now respond. (*See*, Order (#35),

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[1]. Plaintiff originally filed this lawsuit in the Reno-Sparks Tribal Court, and voluntarily dismissed the action pursuant to FRCP Rule 41(a)(1). A true, accurate and correct copy of the Tribal Court's Order of Dismissal, discussing the circumstances of that matter, is attached hereto as "Exhibit 1." Pursuant to Rule 41(a)(1)(B), Plaintiff's dismissal in the tribal court is "without prejudice" and, tribal remedies remain available should he choose to pursue them.

p. 1, ll. 15-25) (*citing, Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) *cert. denied*, 2009 WL 1361563 (May 18, 2009); *Phillip Morris USA, Inc. v. King Mtn. Tobacco Co.*, 552 F.3d1098 (9th Cir. 2009); *Sharber v. Spirit Mtn. Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003)).[2]

II. LEGAL ARGUMENT

Binding Precedent Establishes that this Case Should be Stayed While Plaintiff Exhausts His Tribal Remedies.

A. The Ninth Circuit's *Sharber* decision controls this case.

The Court is correct to raise the issue of exhaustion of tribal remedies under *Marceau* and *Sharber*. "Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal jurisdiction is 'colorable,' provided that there is no evidence of bad faith or harassment." *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (*cert. denied)* (*citing, Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief."). Exhaustion of tribal remedies is mandatory in the Ninth Circuit. *See, Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

Indeed, this case appears to be "on all fours" with *Sharber* where the Ninth Circuit upheld a district court's conclusion "that tribal courts should have the first opportunity to determine whether they have jurisdiction based on the Family and Medical Leave Act." 343 F.3d at 976 ("But the district court erred when . . . it granted Spirit Mountain's motion to dismiss *for lack of jurisdiction* under Fed. R. Civ. P. 12(b)(1)."); *see also Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (district court abused discretion by dismissing action on sovereign

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[2]. Plaintiff's contention that *Sharber v. Spirit Mtn. Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003) has been withdrawn appears to be inaccurate. (*See*, Pl's Brief (#41), p. 2, ll. 2-7). The Ninth Circuit's initial Memorandum Opinion in the *Sharber* matter, found at Fed. Appx. 151 and dated May 15, 2003, was withdrawn and replaced by the decision cited by this Court, found at 343 F.3d 974 and dated September 4, 2003. It appears that the September 4, 2003 published opinion cited by the Court stands. Defendants have included copies of each decision along with the KeyCite History provided by Westlaw with this Brief as "Exhibit 2" for ease of reference.

immunity grounds before Plaintiff exhausted tribal remedies). As was the case in *Sharber*, Plaintiff here filed an FMLA action in Federal court and the tribal defendant moved to dismiss for lack of subject matter jurisdiction under FRCP Rule 12(b)(1). *Sharber* and this case are factually analogous and *Sharber* controls. As a result, the Court must stay the Federal case while Plaintiff exhausts his tribal remedies.

B. Tribal Jurisdiction is "Unquestionably Colorable" in this Case.

Tribal court jurisdiction over activities on tribal lands, "presumptively lie[s]" in the tribal courts. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self government . . . Tribal courts play a vital role in tribal self-government . . . [and] [a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation . . . their civil jurisdiction is not similarly restricted."); *see also, Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that tribal court jurisdiction over activities occurring on tribal land is an essential component of tribal sovereignty, and the fact that the plaintiff is a non-Indian is "immaterial."). The Supreme Court has clearly established that tribal authority "over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.*, 480 U.S. at 18.

Because Plaintiff was a tribal employee, who has sued tribal officials for actions alleged to have occurred in the operation of a tribal entity on tribal lands and in tribal facilities, the jurisdiction of the tribal court over his claims is clearly colorable. Indeed, the entirety of the events concerning Plaintiff's employment and termination, and thus the entirety of the events at issue in this case, occurred on Reno-Sparks Indian Colony tribal lands. The dispute is grounded in Plaintiff's consensual employment relationship with the tribe. As a result, the jurisdiction of the tribal court over the Plaintiff's claims against tribal members is nearing the height of its power and is unquestionably colorable. *See, Iowa Mut. Ins. Co.*, 480 U.S. at 18; *Williams*, 358 U.S. at 223; *Marceau*, 540 F.3d at 921.

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This is especially true where, as here, the nonmember is the plaintiff and the tribal members and tribal officials are the defendants. Weighing heavily in favor of tribal court jurisdiction is the party status of the defendant. *See, Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 n.3 (9th Cir. 2006) (en banc) ("Party status is plainly relevant, as the Court has repeatedly made clear."). Here, the entities being sued are all tribal officials. The Supreme Court's holding in *Williams v. Lee, supra*, where the Court found for tribal jurisdiction, turned on the salient fact that a tribal member was being sued over a dispute arising on the reservation. *See also, Smith*, 434 F.3d at 1132 (*citing, Williams v. Lee*) ("Where the nonmembers are the **plaintiffs**, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction.") (emphasis in original).

Here, the dispute arises out of a consensual employer-employee relationship on tribal lands. Such consensual relationships have even been recognized as a valid basis for extending tribal jurisdiction over cases with non-tribal defendants. *See, Montana v. U.S.*, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). In the Ninth Circuit's *Smith* decision, the Court emphasized the importance attributed to Indian civil jurisdiction cases of situations where a non-member plaintiff is suing tribal officials for a reservation-based dispute:

> This case, unlike the Court's decisions in *Hicks*, *Strate*, and *Montana*, involves a nonmember plaintiff. In this regard Smith is similarly situated to the principal case cited as an example of the *Montana* exceptions: *Williams v. Lee*.

Smith, 434 F.3d at 1136.

The *Smith* Court also notes that the Supreme Court's recent rulings in *Hicks* and *Strate* "reaffirm the validity of *Williams*." *Id.* This dispute, as with the dispute in *Smith* where the tribe retained civil jurisdiction, arises out of activities on tribal lands and involves tribal officials as defendants. Indeed, the facts of this case are even more compelling than the facts

that supported tribal jurisdiction in *Smith* because the tribal officials being sued in here include top tribal officials, including the Tribal Chairman, and all activities in dispute arose on tribal land.

Finally, the Ninth Circuit's decisions in *Sharber* and *Marceau* establish that tribal jurisdiction is unquestionably colorable in this case. First, in *Sharber* – a case that is essentially identical to this one – the Circuit implicitly held that tribal jurisdiction was colorable by concluding that tribal exhaustion applied to the plaintiff's FMLA claim and the issue of sovereign immunity. *Sharber*, 343 F.3d at 975-76. In *Marceau*, the Circuit explicitly held that tribal jurisdiction was "unquestionably colorable" over a contract dispute between a tribal member and a tribal defendant related to events occurring on tribal and Indian lands. *Marceau*, 540 F.3d at 921 (*citing, Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc) (holding that tribal court jurisdiction was colorable where a *non-tribe* member sued a tribe in a contract and tort dispute and the key events *may* have taken place on tribal lands). Thus, under *Sharber* and *Marceau*, tribal jurisdiction is unquestionably colorable over all of Plaintiff's claims.

C. The *Nevada v. Hicks* analysis does not apply here, as this case involves a Plaintiff suing tribal defendants regarding events taking place on tribal land.

Contrary to Plaintiff's argument, this case is not controlled by *Hicks* because the tribe is not attempting to impose its civil jurisdiction over a non-member defendant for activities that took place off of reservation lands. Importantly, in *Hicks* a tribal member filed suit in tribal court against a non-tribal defendant for events that took place off of reservation lands. *Nevada v. Hicks*, 533 U.S. 353, 405-07 (2001). Relying on Supreme Court precedent holding that tribes lack legislative authority to regulate the activities of non-tribal members outside of reservation lands, the *Hicks* court held that the tribal court did not have adjudicative jurisdiction to hear the plaintiff's claims. *Id.*, at 417. Critical to the *Hicks* decision and analysis was the fact that a tribal member was attempting to impose tribal jurisdiction over a non-tribal member for events that occurred off of reservation lands. *Id.*, at 357-359 (employing the Supreme Court's *Montana* analysis to determine whether a tribal court can

assert jurisdiction over a non-tribal defendant). In contrast, this case involves **tribal defendants** being sued for events that took place on tribal lands by a plaintiff who chose to work under the employ of the tribe. Because this is not a situation where an Indian tribe is attempting to impose tribal jurisdiction over a non-tribal defendant, for events that took place off of a reservation, the *Hicks* jurisdictional analysis is completely inapposite.

Rather, the facts of this case are more analogous to those in *Smith* where the Ninth Circuit upheld tribal court jurisdiction of claims brought by a non-member plaintiff against a tribal defendant for events that occurred on reservation lands. *Smith*, 434 F.3d at 1136. While the Plaintiff in *Smith* chose to file his claims in tribal court, and this fact played a role into the Ninth Circuit's decision, the Court also relied on the strong tribal interest "in regulating the conduct of their members" who have been alleged of wrongdoing, and "compensating persons injured by their own." *Id.*, at 1141. The *Smith* Court also accurately noted that tribes acquire jurisdiction over non-members who enter tribal lands or conduct business with a tribe, as the Plaintiff did in this case. *Id*., at 1139. Pursuant to *Williams, Smith*, *Sharber,* and *Marceau* tribal jurisdiction is certainly "colorable" in this case.

Moreover, Plaintiff's argument that *Hicks* stands for the proposition that tribal courts cannot maintain civil jurisdiction over cases arising under a Federal statute has been specifically rejected by the Ninth Circuit. (*See*, Pl's Brief (#41), p. 4). In *Phillip Morris* the Ninth Circuit stated that "*Hicks* does not, as Phillip Morris suggests, stand for a rule that tribes have no jurisdiction over federal statutory claims absent an explicit statutory grant." *Phillip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 552 F.3d 1098, 32 (9th Cir. 2009). Thus, *Hicks* does not preclude tribal jurisdiction over Plaintiff's FMLA claim, and all of Plaintiff's claims should be stayed pending his exhaustion of tribal remedies.

Finally, and contrary to Plaintiff's intimations, the Ninth Circuit has made it clear that the tribal exhaustion requirement does not depend on whether Plaintiff has a pending action over the same matter in tribal court. *Sharber v. Spirit Mtn. Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) ("The absence of ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.").

III. CONCLUSION

"Exhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Binding Supreme Court and Ninth Circuit case law instruct that tribal jurisdiction is colorable over Plaintiff's FMLA and common law claims. As a result, and based on the arguments set forth herein, Plaintiff's claims should be stayed while he exhausts his tribal remedies.

DATED this 10th day of June, 2009.

ERICKSON, THORPE & SWAINSTON, LTD.

/s/ Brent L. Ryman

THOMAS P. BEKO, ESQ. (#002653)
BRENT L. RYMAN, ESQ. (#008648)
ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street
P.O. Box 3559
Reno, Nevada 89505
Telephone: (775) 786-3930
Attorneys for Defendants

EXHIBIT 1

EXHIBIT 1

IN THE RENO-SPARKS TRIBAL COURT
IN AND FOR THE RENO-SPARKS INDIAN COLONY
RENO, WASHOE COUNTY, NEVADA

FILED
APR 0 1 2008
TIME: 2:00 P.M.
CLERK: N. Tilney
RSIC TRIBAL COURT

DONOVAN PADDY,
Plaintiff,

v.

RENO-SPARKS INDIAN COLONY; RENO-SPARKS INDIAN COLONY PUBLIC WORKS DEPARTMENT; RENO-SPARKS INDIAN COLONY TRIBAL COUNCIL; RENO-SPARKS INDIAN COLONY HUMAN RESOURCES DEPARTMENT,
Defendants.
_____/

No. CV-BC-2008-0001

ORDER RE. PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL AND DEFENDANTS' RESPONSE

On March 28, 2008, Plaintiff Donovan Paddy filed a Notice of Voluntary Dismissal under Rule 41(a)(1) of the Federal Rules of Civil Procedure. Rule 41(a)(1) provides that

> an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first . . . .

Plaintiff's Notice states:

> This voluntary dismissal is proper pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure (followed by Tribal Court Rule 39) in that no defendant has filed an Answer or a Motion for Summary Judgment.

Although the Court would not ordinarily need to be involved in the event of voluntary dismissal under Rule 41(a)(1), the Tribal Defendants filed a response on March 31, 2008, seeking to clarify the record. Defendants believe that Plaintiff cites as the "reason" for his voluntary dismissal

RENO-SPARKS INDIAN COLONY TRIBAL COURT
1900 Prosperity St.
Reno, Nevada 89502
(775) 785-8775/8750
Fax (775) 329-8153

the fact that "no defendant has filed an Answer or a Motion for Summary Judgment." Defendants point out that their deadline for filing an answer or summary judgment motion was delayed by the Court in order to permit briefing on Defendants' Motion to Dismiss and that Defendants have not defaulted in any way.

The Court does not read Plaintiff's Notice in the same way Defendants do. In the Court's view, Plaintiff simply tracks the language of Rule 41(a)(1), citing the fact that Defendants have not filed an answer or summary judgment motion not as a reason for dismissal but, rather, simply to demonstrate eligibility for voluntary dismissal under Rule 41(a)(1). Defendants are certainly correct, however, that the deadline for an answer or summary judgment motion was delayed and that Defendants have not defaulted in any way.

SO ORDERED this 1st day of April, 2008.

Susan M. Alexander
Susan M. Alexander
Chief Judge

RENO-SPARKS
INDIAN COLONY
TRIBAL COURT
1900 Prosperity St.
Reno, Nevada 89502
(775) 785-8775/8750
Fax (775) 329-8153

EXHIBIT 2

EXHIBIT 2

Westlaw

Date of Printing: Jun 07, 2009

KEYCITE

H Sharber v. Spirit Mountain Gaming Inc., 343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091 (9th Cir.(Or.),Sep 04, 2003) (NO. 01-35500)

History

Direct History

1 Sharber v. Spirit Mountain Gaming, Inc., 2001 WL 34042621 (D.Or. Apr 17, 2001) (NO. CIV. 00-1376-AS)

Affirmed in Part, Reversed in Part by

=> 2 **Sharber v. Spirit Mountain Gaming Inc.,** 343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091 (9th Cir.(Or.) Sep 04, 2003) (NO. 01-35500)

3 Sharber v. Spirit Mountain Gaming Inc., 65 Fed.Appx. 151 (9th Cir.(Or.) May 15, 2003) (Not selected for publication in the Federal Reporter, NO. 01-35500)

Republished at

=> 4 **Sharber v. Spirit Mountain Gaming Inc.,** 343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091 (9th Cir.(Or.) Sep 04, 2003) (NO. 01-35500)

Court Documents

Appellate Court Documents (U.S.A.)

C.A.9 Appellate Briefs

5 Steven SHARBER, Plaintiff-Appellant, v. SPIRIT MOUNTAIN GAMING, INC., Defendant-Appellee., 2001 WL 34108241 (Appellate Brief) (C.A.9 Aug. 23, 2001) **Brief of Appellant** (NO. 01-35500)

6 Steven SHARBER, Plaintiff-Appellant, v. SPIRIT MOUNTAIN GAMING, INC., Defendant-Appelle., 2001 WL 34108242 (Appellate Brief) (C.A.9 Oct. 11, 2001) **Brief of Defendant-Appellee** (NO. 01-35500)

Dockets (U.S.A.)

C.A.9

7 SHARBER v. SPIRIT MOUNTAIN, NO. 01-35500 (Docket) (C.A.9 May. 31, 2001)

D.Or.

8 SHARBER v. SPIRIT MOUNTAIN GAM, NO. 3:00CV01376 (Docket) (D.Or. Oct. 06, 2000)

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343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091
(Cite as: 343 F.3d 974)

H

United States Court of Appeals,
Ninth Circuit.
Steven SHARBER, Plaintiff-Appellant,
v.
SPIRIT MOUNTAIN GAMING INC., Defendant-Appellee.
No. 01-35500.

Argued and Submitted Nov. 4, 2002.
Decided May 15, 2003.
Redesignated for Publication Sept. 4, 2003.

Employee brought action against casino pursuant to Family and Medical Leave Act (FMLA). The United States District Court for the District of Oregon, Robert E. Jones, J., 2001 WL 34042621, granted casino's motion to dismiss. Employee appealed. The Court of Appeals held that: (1) tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on FMLA; (2) tribal exhaustion requirement applies to issues of tribal sovereign immunity; and (3) stay, rather than dismissal, was warranted.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Indians 209 ⚿244

209 Indians
209VI Actions
209k242 Conditions Precedent; Exhaustion
209k244 k. Exhaustion of Tribal Court Remedies. Most Cited Cases
(Formerly 209k27(3))
Tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act (FMLA). Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq.

[2] Indians 209 ⚿244

209 Indians
209VI Actions
209k242 Conditions Precedent; Exhaustion
209k244 k. Exhaustion of Tribal Court Remedies. Most Cited Cases
(Formerly 209k27(3))
The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.

[3] Indians 209 ⚿244

209 Indians
209VI Actions
209k242 Conditions Precedent; Exhaustion
209k244 k. Exhaustion of Tribal Court Remedies. Most Cited Cases
(Formerly 209k27(3))
Tribal exhaustion requirement applies to issues of tribal sovereign immunity.

[4] Indians 209 ⚿235

209 Indians
209VI Actions
209k234 Sovereign Immunity
209k235 k. In General. Most Cited Cases
(Formerly 209k27(1))
Determining whether a tribe has waived tribal sovereign immunity, or whether Congress has abrogated its immunity, requires a careful study of the application of tribal laws, and tribal court decisions.

[5] Indians 209 ⚿244

209 Indians
209VI Actions
209k242 Conditions Precedent; Exhaustion
209k244 k. Exhaustion of Tribal Court Remedies. Most Cited Cases
(Formerly 209k27(3))
Stay pending exhaustion of tribal remedies, rather than dismissal for lack of subject matter jurisdiction, was warranted in action under Family and Medical Leave Act (FMLA), particularly when dis-

missal could mean that employee would be barred permanently from asserting his claims in federal forum due to running of statute of limitations. Family and Medical Leave Act of 1993, § 107(c), 29 U.S.C.A. § 2617(c); Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

***975** William R. Goode, Portland, Oregon, argued for the plaintiff-appellant.

Courtney W. Wiswall, Portland, Oregon, argued for the defendant-appellee. Charles F. Adams and Paul C. Buchanan joined her on the briefs.

Appeal from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-00-01376-AS.

Before REAVLEY,[FN*]KOZINSKI and W. FLETCHER, Circuit Judges.

FN* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

[1] 1. The district court did not err in concluding that tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) ("[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court."); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 855-56, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (holding that the inquiry over "whether a tribal court has the power to exercise civil subject-matter jurisdiction ... should be conducted in the first instance in the Tribal Court itself").

***976** [2] The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement. *See United States v. Plainbull,* 957 F.2d 724, 728 (9th Cir.1992) ("Whether a tribal action is pending ... does not determine whether abstention is appropriate.... [W]e held that abstention ... was required even in the absence of a pending tribal court action.").

[3][4] 2. Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires "a careful study of the application of tribal laws, and tribal court decisions." *Stock West Corp. v. Taylor,* 964 F.2d 912, 920 (9th Cir.1992); *see also Nat'l Farmers,* 471 U.S. at 855-56, 105 S.Ct. 2447. Accordingly, the district court properly "stayed its hand until after the ... Tribal Courts have the opportunity to resolve the question." *Stock West Corp.,* 964 F.2d at 920.

[5] 3. But the district court erred when, instead of simply staying the federal action, it granted Spirit Mountain's motion to dismiss *for lack of jurisdiction* under Fed.R.Civ.P. 12(b)(1). *See Iowa Mut. Ins. Co.,* 480 U.S. at 16 n. 8, 19-20, 107 S.Ct. 971 ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.... [T]he court [of appeals] should not have affirmed the District Court's dismissal for lack of subject-matter jurisdiction."). The error is exacerbated here because dismissal might mean that Sharber would later be "barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." *Deakins v. Monaghan,* 484 U.S. 193, 203 n. 7, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988); *see also*29 U.S.C. § 2617(c). Under the circumstances, the district court should have stayed, not dismissed, the federal action pending the exhaustion of tribal remedies. *See, e.g., Allstate Indem. Co. v. Stump,* 191 F.3d 1071, 1076 (9th Cir.1999). We remand the case to the district court for it to enter the appropriate order.

343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091
(Cite as: 343 F.3d 974)

AFFIRMED in part, REVERSED in part and REMANDED. No costs.

C.A.9 (Or.),2003.
Sharber v. Spirit Mountain Gaming Inc.
343 F.3d 974, 84 Empl. Prac. Dec. P 41,477, 149 Lab.Cas. P 34,756, 8 Wage & Hour Cas.2d (BNA) 1744, 03 Cal. Daily Op. Serv. 8096, 2003 Daily Journal D.A.R. 10,091

END OF DOCUMENT

Westlaw

65 Fed.Appx. 151
65 Fed.Appx. 151, 2003 WL 21147447 (C.A.9 (Or.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 65 Fed.Appx. 151, 2003 WL 21147447 (C.A.9 (Or.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
Steven SHARBER, Plaintiff-Appellant,
v.
SPIRIT MOUNTAIN GAMING INC., Defendant-Appellee.
No. 01-35500.
D.C. No. CV-00-01376-AS.

Argued and Submitted Nov. 4, 2002.
Decided May 15, 2003.

Employee brought action against casino pursuant to Family and Medical Leave Act (FMLA). The United States District Court for the District of Oregon, Robert E. Jones, J., 2001 WL 34042621, granted casino's motion to dismiss. Employee appealed. The Court of Appeals held that: (1) tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on FMLA; (2) tribal exhaustion requirement applies to issues of tribal sovereign immunity; and (3) stay, rather than dismissal, was warranted.

Affirmed in part, reversed in part, and remanded.

***151** Appeal from the United States District Court for the District of Oregon, Robert E. Jones, District Judge, Presiding.

***152** Before REAVLEY,[FN*]KOZINSKI and W. FLETCHER, Circuit Judges.

FN* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

****1** 1. The district court did not err in concluding that tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) ("[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court."); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 855-56, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (holding that the inquiry over "whether a tribal court has the power to exercise civil subject-matter jurisdiction ... should be conducted in the first instance in the Tribal Court itself").

The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement. *See United States v. Plainbull,* 957 F.2d 724, 728 (9th Cir.1992) ("Whether a tribal action is pending ... does not determine whether abstention is appropriate.... [W]e held that abstention ... was required even in the absence of a pending tribal court action.").

2. Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires "a

careful study of the application of tribal laws, and tribal court decisions." *Stock West Corp. v. Taylor,* 964 F.2d 912, 920 (9th Cir.1992); *see also Nat'l Farmers,* 471 U.S. at 855-56, 105 S.Ct. 2447. Accordingly, the district court properly "stayed its hand until after the ... Tribal Courts have the opportunity to resolve the question." *Stock West Corp.,* 964 F.2d at 920.

3. But the district court erred when, instead of simply staying the federal action, it granted Spirit Mountain's motion to dismiss *for lack of jurisdiction* under Fed.R.Civ.P. 12(b)(1). *See Iowa Mut. Ins. Co.,* 480 U.S. at 16 n. 8, 19-20, 107 S.Ct. 971 ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.... [T]he court [of appeals] should not have affirmed the District Court's dismissal for lack of subject-matter jurisdiction."). The error is exacerbated here because dismissal might mean that Sharber would later be "barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." *Deakins v. Monaghan,* 484 U.S. 193, 203 n. 7, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988); *see also*29 U.S.C. § 2617(c). Under the circumstances, the district court should have stayed, not dismissed, the federal action pending the exhaustion of tribal remedies. *See, e.g., Allstate Indem. Co. v. Stump,* 191 F.3d 1071, 1076 (9th Cir.1999). We remand the case to the district court for it to enter the appropriate order.

AFFIRMED in part, REVERSED in part and REMANDED. No costs.

C.A.9 (Or.),2003.
Sharber v. Spirit Mountain Gaming Inc.
65 Fed.Appx. 151, 2003 WL 21147447 (C.A.9 (Or.))

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